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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

CORE WEALTH MANAGEMENT, LLC, Plaintiff, Cross-defendant and Respondent, ROBERT G. KLEIN, as Personal Representative, etc., Cross-defendant and Respondent, v. RONALD HELLER et al., Defendants, Cross-complainants and Appellants, FRED RIFKIN et al., Defendants and Appellants.	2d Civil No. B199366 (Super. Ct. No. 1157647) (Santa Barbara County)

Tim Gramatovich and Ronald Heller owned Peritus Asset Management (Peritus). When Peritus suffered financial losses, Michael Klein took control of the company, and Core Wealth Management, LLC. (Core), a company owned by Klein, acquired all of its assets. In 2002, Gramatovich and Heller became employees of Core, as did former Peritus employee Heather Rupp.

During their employment by Core, Gramatovich, Heller and Rupp (GH&R) planned to form a company called Peritus I to compete with Core. They copied Core client lists and financial data, solicited Core clients, and otherwise disrupted Core's business. Core sued GH&R, Peritus I, and Peritus I investors Fred Rifkin and Edgar Robie for breach of contract, breach of fiduciary duty, misappropriation of trade secrets, and other claims. GH&R and Peritus I cross-complained for breach of contract, breach of fiduciary duty, defamation, and other claims. After trial, the jury returned a verdict on the complaint in favor of Core for $41 million, and a verdict on the cross-complaint in favor of GH&R for nominal damages.

GH&R filed a motion for a new trial of both the complaint and cross-complaint. The trial court remitted the monetary damage award on the complaint to $4 million, which Core accepted. The motion was otherwise denied.

GH&R, Peritus I, Rifkin and Robie appealed the judgment. As to the complaint, they contend the trial court erred in instructing the jury regarding fiduciary duty and conspiracy, and in admitting expert testimony. They also claim insufficient evidence to support the $4 million damage award. As to the cross-complaint, they contend that the damages awarded on the cross-complaint are inadequate, and challenge an award of attorney fees. We affirm.

FACTS AND PROCEDURAL HISTORY

In 1995, appellants Heller and Gramatovich formed Peritus, an investment advisor business which managed high yield bond investments for corporations and individuals. In 1999, Rupp joined Peritus as a financial analyst.

In the late 1990s, Klein became the largest investor in Peritus and, in late 2001, its CEO. When Klein learned Peritus was losing money, he reduced operating expenses and obtained new investors. Peritus continued losing money. Klein then loaned $100,000 to Peritus (Bridge Note) to meet short-term operating expenses. The Bridge Note was secured by all assets of Peritus and permitted Klein to foreclose if the loan was not repaid in 30 days. Klein assured GH&R that, in the event of foreclosure, he would hire them as employees and provide a profit-sharing plan.

In April 2002, Peritus defaulted and Klein foreclosed on the Bridge Note. Klein transferred the Peritus I assets to Core, and appellants GH&R signed employment agreements making them at-will Core employees. The agreements did not specify compensation, but the salaries and profit-sharing interests of GH&R were set forth in e-mails.

In or about July 2002, Klein stated to GH&R that the profit-sharing plan he had created for them was a discretionary plan. Nonetheless, Core payments under the plan continued to be made to GH&R. At the same time, Core began work creating and launching a "collateralized debt obligation" (CDO) with another asset management company named Atlantic Asset Management (Atlantic).

A CDO is a complex investment vehicle that acquires a portfolio of underlying assets and sells a security called a CDO to investors which gives the investors an interest in the cash flow from the underlying assets. The portfolio of underlying assets serves as the collateral for the CDO security. A corporate entity is created to issue the security, and the entity uses the proceeds from the sale of the security to purchase the portfolio of underlying assets. The entity earns a commission when a CDO security is issued and management fees during the life of the CDO.

In this case, the entity formed to issue the CDOs was named "Prado," and the underlying assets serving as collateral were bonds. The creation of Prado and the CDO involved three steps. First, in April 2003, Prado was formed and began borrowing money from investors to purchase its bond portfolio. Second, in November 2003, the bond portfolio was assembled and Prado began issuing its CDO securities replacing the interim loans previously made by investors. Third, on May 17, 2004, rating agencies evaluated and approved Prado's portfolio.

Core was Prado's primary collateral manager, and Atlantic was Core's co-manager. Prado became fully funded with a $350 million portfolio of bond assets serving as collateral for its CDO. Typically, the start-up commission for the funding would be a cash payment of .75 percent of the underlying collateral, but Core took a reduced 0.09 percent fee in cash in order to protect Prado's cash flow. Based on approximately

$350 million in underlying bond assets, Core's cash fee was reduced from approximately $2.65 million to approximately $315,000. In return for the reduced cash fee, Core received 23,400 of Prado's high risk Class D bonds each with a $1,000 par value and a maturity date in 2014.[1] Co-manager Atlantic received 2,600 of the Class D bonds as well.

Core and Atlantic sought advice regarding the tax treatment of the Class D bonds. In order to avoid an immediate tax liability of several million dollars, they transferred their Prado Class D bonds to a bank account of Old Growth, a Panamanian shell corporation controlled by Klein. The transfer occurred in late 2003. Core received a $125,000 note from Old Growth in payment for the bonds and an option to repurchase the bonds. Gramatovich and Heller had knowledge of the transfer and that it was being made for tax purposes. They did not object or claim that any portion of the Class D bonds were subject to their profit-sharing agreements and took no action to establish a market value for that purpose.

Gramatovich and Heller, however, did claim that interest earned on the Class D bonds while in the Old Growth account constituted profit to Core subject to their profit-sharing arrangement. Klein disagreed and, although no interest had been paid to Core, added the amount requested by Gramatovich and Heller to the profit-sharing pool.

In December 2003, Klein sold a portion of the Class D bonds in the Old Growth account to the Cancer Center of Santa Barbara. The portion sold had a par value of $10 million. The Cancer Center deposited $10 million in the Old Growth bank account in return for Klein's personal guarantee of repayment and a minimum rate of return. In the fall of 2004, the Cancer Center sought to sell $6 million of the previously-purchased Class D bonds. Core paid $6 million to the Cancer Center and distributed the bonds to Core investors.

In the summer of 2003, GH&R decided to establish a new company to compete with Core and, once the new company was in operation, to terminate their

[1] These securities were called "bonds" but should not be confused with the underlying bond assets in Prado's portfolio which were used to collateralize the CDOs.

employment with Core. At the same time as the new company, Peritus I, was being formed and prior to terminating their employment with Core, GH&R copied Core's financial records and other confidential and proprietary information, including client lists and research files. Months before they terminated their employment, GH&R as well as appellants Rifkin and Robie began building an investment portfolio for Peritus I and made efforts to take over management of the Prado CDO.

On May 5, 2004, GH&R resigned from Core without any notice or warning to Klein and at a time when Klein was out of the country. Due to the sudden resignations of GH&R and other Core employees, Core could not open for business on the following business day. In addition, the GH&R resignations jeopardized Core's status as the collateral manager of Prado. Under the Prado agreements, Prado's institutional investors had the option of replacing Core in the event key Core personnel ceased to be employed by the company. Klein returned to California and attempted to reestablish Core operations and preserve its status as Prado's manager by retaining new personnel. In part due to interference from GH&R, Klein was unsuccessful in restoring Core's business operations. Core suffered irreparable financial losses including its removal as the manager of the Prado CDO.

On May 20, 2004, Core sued appellants GH&R, Rifkin, Robie and Peritus. The amended complaint alleges causes of action for misappropriation of trade secrets, wrongful use of trade name, trade disparagement, breach of contract, breach of fiduciary duty, intentional interference with contract, conspiracy, and related claims. In July 2004, GH&R cross-complained for breach of profit-sharing agreements, breach of fiduciary duty, fraud regarding the Bridge Note, defamation, and related claims.

A seven-week jury trial ensued in 2006. On December 22, 2006, the jury returned a general verdict on the complaint in favor of Core and awarded damages of $41,734,727. The jury also returned a general verdict on the cross-complaint in favor of appellants against Core and Klein, but the jury's damage award on the cross-complaint was only $1 to Gramatovich, $1 to Heller, and $70,650 to Rupp. Appellants GH&R, Robie, Rifkin and Peritus I filed a motion for a new trial on both the complaint and cross-

complaint. The motion for a new trial of the complaint claimed instructional error, excessive damages, and jury misconduct. The motion for a new trial of the cross-complaint claimed inadequate damages and requested an additur of $22,487,000. The trial court granted the motion for new trial of the complaint to the extent of reducing the damage award to $4 million plus attorney fees and costs. The court denied the motion as to the cross-complaint.

DISCUSSION

APPEAL OF JUDGMENT ON COMPLAINT

No Instructional Error

1. *Fiduciary Duty Instruction*

Appellants contend the jury instruction defining the scope of GH&R's fiduciary duty to Core was overbroad. They argue that any fiduciary duty was limited to the confidentiality of Core's business information, but that the trial court instructed the jury that the duty extended to all aspects of their employment. As a result, appellants argue, the instruction permitted the jury to conclude GH&R had a fiduciary duty not to terminate their employment in a manner inconvenient to Core. We disagree.

A fiduciary relationship is established by agreement or law. (See *Richelle L. v. Roman Catholic Archbishop* (2003) 106 Cal.App.4th 257, 271.) A contractual fiduciary relationship arises where a confidence is reposed by one person in the integrity of another and the other person voluntarily accepts the confidence. (*Wolf v. Superior Court* (2003) 107 Cal.App.4th 25, 29-30.)

It is undisputed that GH&R had a fiduciary duty to Core with respect to the matters set forth in their employment agreements. Those agreements prohibited GH&R from disclosing Core's "Confidential Information" or using such information for any purpose other than Core's benefit. The agreements defined "Confidential Information" as "proprietary information, technical data, trade secrets or know-how, including, but not limited to, research, product plans, products, services, customer lists and customers . . . or other business information disclosed to [GH&R] by the Company either directly or indirectly." The employment agreements required GH&R to return all documents

concerning Core's business upon termination of their employment, and prohibited outside business activity related to Core and solicitation of Core employees to leave the company for 12 months following termination of employment. GH&R also agreed to adhere to the conflict of interest guidelines attached to their contracts.

In relevant part, the trial court instructed the jury that a "fiduciary duty may be undertaken by the parties' agreement, or, by one party having control over the confidential or valuable property of the other." The court also instructed the jury that fiduciaries are required to disclose "all material facts affecting their relationship," and refrain from using their position "to gain any advantage by the misrepresentation, concealment, threat or adverse pressure of any kind on the other." Although the instructions used the general phrase "affecting their relationship," the trial court instructed the jury that GH&R could announce new employment to Core's clients, respond to unsolicited requests by Core customers to open accounts with GH&R's new employer, and terminate their employment without notice.

GH&R argue that these instructions permitted the jury to conclude that GH&R breached their fiduciary duty to Core by terminating their employment in a manner "inconvenient" to Core, and failing to disclose to Core preparations to compete with Core after termination. Our reading of the instructions requires the opposite conclusion. In essence, the instructions directed the jury that GH&R had the right to resign at any time, even an "inconvenient" time and without explanation. And, the instructions expressly stated that GH&R could announce new employment and respond to Core clients who initiate contact with them.

The instructions provided the jury with a proper statement of the essential legal issues concerning Core's breach of fiduciary duty claim and informed the jury of the correct standard to apply. (See *Metcalf v. County of San Joaquin* (2008) 42 Cal.4th 1121, 1130-1131.) The instructions also stated the law without unduly overemphasizing any issues, theories, or defenses. (*Ibid.*) There is no basis in the record to conclude that the jury was misled or confused, or that any reasonable juror could have misinterpreted the

instructions as restricting GH&R's right to resign from Core. (*Major v. Western Home Ins. Co.* (2009) 169 Cal.App.4th 1197, 1218.)

Moreover, California law permits an employee to seek other employment and to make preparations to compete, but not to "transfer his loyalty to a competitor." (*Fowler v. Varian Associates, Inc.* (1987) 196 Cal.App.3d 34, 41; see also *Huong Que, Inc. v. Luu* (2007) 150 Cal.App.4th 400, 414.) Failure to disclose preparations to compete breaches a fiduciary's duty "where particular circumstances render nondisclosure harmful to the corporation," and where the employee's actions "constitute a breach under the general principles applicable to the performance of his trust." (*Bancroft-Whitney Co. v. Glen* (1966) 64 Cal.2d 327, 347.) The jury instructions were inconsistent with this principle.

2. *Conspiracy Instruction*

Appellants contend that the trial court erred in instructing the jury that non-fiduciary defendants Rifkin and Robie could be liable for conspiracy to breach the fiduciary duty owed to Core by GH&R. We disagree.

An action for civil conspiracy requires formation of a conspiracy and damage to the plaintiff from an act in furtherance of the conspiracy. (*Doctors' Co. v. Superior Court* (1989) 49 Cal.3d 39, 44.) A conspiracy is not a tort in itself and liability requires commission of an independent tort. (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd*. (1994) 7 Cal.4th 503, 510-511.) Accordingly, conspiracy allows recovery only against a party with an independent duty and direct liability to the plaintiff for breach of that duty. (*Id.* at pp. 511-512.)

As appellants argue, Rifkin and Robie were not Core employees and had no fiduciary duty to Core. Nevertheless, any person has a duty not to use trade secrets the person knows have been improperly obtained by others and is liable for misappropriation under such circumstances. (*Cypress Semiconductor Corp. v. Superior Court* (2008) 163 Cal.App.4th 575, 585.) "Misappropriation" includes acquisition of another's trade secret by a person who has reason to know the trade secret was acquired by improper means, and disclosure or use of a trade secret without consent. (Civ. Code, § 3426.1, subd. (b).)

The trial court correctly instructed the jury in accordance with applicable law. The court instructed that Core sought recovery from defendants Rifkin and Robie for engaging in a "conspiracy to misappropriate the trade secrets and customer lists of" Core. The court further instructed that "[m]ere knowledge of a wrongful act without cooperation or agreement" is insufficient for liability, but Rifkin and Robie could be liable if they were "aware that the defendants planned to misappropriate the trade secrets and customer lists" and "agreed with each other and intended" to commit the misappropriation.

Appellants do not dispute that Rifkin and Robie could be liable for their improper use of Core trade secrets, but argue that Core's claim was broader than misappropriation of trade secrets, and included conspiracy to breach GH&R's fiduciary duty to Core. We agree that the complaint alleges conspiracy to breach fiduciary and other duties, but appellants challenge the jury instructions, not the complaint. It is indisputable that the jury instructions at issue expressly limit the conspiracy claim to misappropriation of trade secrets. There was no instructional error.

We also reject appellants' argument that a reference to "*conspiring with a disloyal fiduciary*" during argument permitted the jury to believe the conspiracy claim extended to a conspiracy to breach fiduciary duty. There is no basis in the record to conclude that the jury was misled or confused or that the reference affected the jury's verdict. (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 582-583.)

In addition, appellants argue that the instructions erroneously refer to a "conspiracy to commit aiding and abetting and conspiracy to misappropriate" trade secrets. We agree conspiracy and aiding and abetting are separate forms of tort liability, and some trial court language appears to combine them. There is no basis in the record, however, to conclude that inartful language by the court confused the jury or influenced the verdict in any manner. (*Soule v. General Motors Corp., supra,* 8 Cal.4th at pp. 582-583.)

In a separate contention, defendants argue that the conspiracy to misappropriate trade secrets instruction was deficient because that cause of action has

been preempted by the Uniform Trade Secrets Act ("CUTSA"). (Civ. Code, § 3426 et seq.) One panel of the Court of Appeal has held that CUTSA preempts common law claims that are "'based on the same nucleus of facts as the misappropriation of trade secrets claim for relief.'" (*K.C. Multimedia, Inc. v. Bank of America Technology & Operations, Inc* (2009) 171 Cal.App.4th 939, 958.) But, CUTSA expressly provides that it does not preempt "contractual remedies, whether or not based upon misappropriation of a trade secret," or "other civil remedies that are not based upon misappropriation of a trade secret . . . ." (Civ. Code, § 3426.7, subd. (b); see *K.C. Multimedia, Inc., supra,* at p. 958.) Evidence supports Core's claim that Rifkin and Robie knowingly and intentionally acted to induce a breach of the employment agreements between Core and GH&R. (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 55.)

Moreover, common law claims based on facts in addition to trade secret misappropriation are not preempted by CUTSA. Here, the conspiracy claim includes allegations and proof that, while still employed by Core, GH&R breached their duty of loyalty by working for the benefit of Peritus I in addition to misappropriating trade secrets. (*Huong Que, Inc. v. Luu, supra,* 150 Cal.App.4th at p. 410; *Stokes v. Dole Nut Co.* (1995) 41 Cal.App.4th 285, 295.) These allegations and proof do not rely on the same nucleus of facts as the misappropriation of trade secrets claim because they include the manner in which GH&R resigned from Core as well as other conduct interfering with Klein's ability to reestablish Core after GH&R left the company.

Expert Testimony Properly Admitted

Appellants contend the trial court erred by admitting testimony from expert Curtis Kimball that expressed an opinion regarding the existence of a legal duty, and also invaded the fact-finding role of the jury. We disagree.

Expert opinion testimony is admissible when it is "[r]elated to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." (Evid. Code, § 801, subd. (a); *Summers v. A.L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, 1178.) Opinion evidence may concern an ultimate issue of fact, but is inadmissible if it concerns a question of law. (*Summers,* at pp. 1178-1179.) Also, expert

testimony expressing an expert's belief as to how the case should be decided is impermissible. (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1099; *Summers*, at pp. 1182-1183.) We review a trial court ruling on the admission of opinion evidence under the abuse of discretion standard. (*Summers*, at pp. 1168-1169; *Amtower v. Photon Dynamics, Inc.* (2008) 158 Cal.App.4th 1582, 1598-1599.) There was no abuse of discretion in admitting Kimball's expert testimony.

Curtis Kimball testified about the rules and ethical standards of the Chartered Financial Analyst Institute (CFAI), a private trade association for certified financial analysts (CFAs). CFAs manage investment portfolios for financial institutions and other companies. Certification as a CFA requires a series of examinations over a three-year period. Gramatovich and Rupp are CFAs. Heller is not.

Kimball testified that the CFAI has formulated a code of ethics and standards of professional practice for CFAs and imposes disciplinary actions for violation of these standards. He testified that, based on a review of discovery documents, Gramatovich and Rupp violated the ethical standards of the institute concerning misuse of confidential information, misappropriation of trade secrets, causing the resignation of Core employees, and solicitation of employer clients before resignation.

We disagree with appellants' argument that Kimball testified as to their legal duties in the guise of offering an expert opinion. Kimball testified that CFA standards are not the law, and refused to express an opinion as to whether the violation of CFA standards in this case violated California law. Kimball also declined to answer questions that he considered to require legal opinions. His expert testimony was limited to his opinion regarding voluntary ethical standards that, in substance, had been incorporated into the GH&R employment agreements which required GH&R to "diligently adhere" to conflict of interest guidelines attached to the agreements. Kimball properly explained the meaning of industry standards, and did not opine on the elements of a cause of action under California law. (See *Summers v. A.L. Gilbert Co., supra*, 69 Cal.App.4th at pp. 1181-1182; *Kahn v. East Side Union High School Dist.* (2003) 31 Cal.4th 990, 1017.)

Moreover, the jury was specifically instructed that it was not bound by the opinions of such witnesses but should give such opinions the weight to which they thought them entitled in view of the qualifications and credibility of the witnesses and the reasons given by them in support of their opinions. The record shows no indication that the jury failed to follow this instruction.

Substantial Evidence Supports Damage Award

Appellants contend the reduced damages awarded by the trial court were not supported by substantial evidence. They argue that business losses suffered by Core, including the removal of Core as Prado's manager, resulted from the lawful termination of their at-will employment and lawful formation of Peritus I, and not by any wrongful conduct. We disagree.

The amount of damages in a civil case is a fact question committed first to the discretion of the jury and second to the discretion of the trial judge if there is a motion for new trial. (*Pool v. City of Oakland* (1986) 42 Cal.3d 1051, 1067; *Westphal v. Wal-Mart Stores, Inc.* (1998) 68 Cal.App.4th 1071, 1078.) In a motion for new trial, the trial court weighs the evidence and makes a determination of appropriate damages as an independent trier of fact. (*County of Los Angeles v. Southern California Edison Co.* (2003) 112 Cal.App.4th 1108, 1121; *Wallis v. Farmers Group, Inc.* (1990) 220 Cal.App.3d 718, 739, disapproved on other grounds in *Dore v. Arnold Worldwide, Inc.* (2006) 39 Cal.4th 384, 394, fn. 2.)

On review, an appellate court will overturn a trial court only when its ruling is not supported by substantial evidence. (*Wallis v. Farmers Group, Inc., supra,* 220 Cal.App.3d at p. 739.) We presume the record contains sufficient evidence to support the judgment and consider the evidence in the light most favorable to the judgment. (*Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 614; *Fortman v. Hemco, Inc.* (1989) 211 Cal.App.3d 241, 259.) Whether the claim is that damages are too high or too low, an appellate court will not interfere except when the decision shocks the conscience and suggests passion, prejudice or corruption by the jury, or where the evidence demonstrates

the award is insufficient as a matter of law. (*Pool v. City of Oakland, supra*, 42 Cal.3d at p. 1067.)

Here, there is substantial evidence supporting the trial court's determination of damages. Although the resignations of GH&R and formation of a company to compete with Core were lawful, other evidence supports the conclusion that appellants engaged in a course of conduct designed to cripple Core and establish Peritus I as a replacement manager of Core assets. The evidence shows that for months prior to the resignations of GH&R appellants appropriated Core's proprietary information for their own benefit, and made plans to acquire Core's clients for their new company. The evidence shows that appellants orchestrated GH&R's resignation and the resignation of other Core employees to occur simultaneously while Klein was out of the country and unable to hire new employees or otherwise respond to the appellant-created crisis. There is also evidence that appellants interfered with an offer of new personnel by Atlantic which would have allowed Core to continue in operation.

Appellants claim there is evidence that they never utilized Core's proprietary information, and that the GH&R resignations standing alone were sufficient to tip Core over the edge. The existence of evidence supporting appellants' position, however, does not negate the existence of substantial evidence supporting the trial court's findings. (See *Beck Development Co. v. Southern Pacific Transportation Co.* (1996) 44 Cal.App.4th 1160, 1203-1204.) It was reasonable for the trial court and the jury to have concluded that appellants' conduct constituted a breach of their fiduciary duty and duty of loyalty, a breach of contract, and the misappropriation of trade secrets.

APPEAL OF JUDGMENT ON CROSS-COMPLAINT

Damage Award Adequate

Appellants contend the trial court erred in denying their motion for new trial which claimed the damages awarded on the cross-complaint were inadequate. They argue that, by rendering a general verdict, the jury made implied findings in their favor on all claims submitted to the jury, including a finding that the 23,400 Prado Class D bonds issued to Core constituted income subject to the GH&R profit-sharing agreements.

They argue that, by failing to include an amount reflecting GH&R's profit-sharing entitlements, the damage award was inadequate as a matter of law. We disagree.

As previously stated, damages in a civil case is a fact question committed first to the discretion of the jury and second to the discretion of the trial judge if there is a motion for new trial. (*Pool v. City of Oakland, supra,* 42 Cal.3d at p. 1067; *Westphal v. Wal-Mart Stores, Inc., supra,* 68 Cal.App.4th at p. 1078.) In a motion for new trial, the trial court weighs the evidence as an independent trier of fact, and an appellate court reviews its determination under the substantial evidence standard. (*County of Los Angeles v. Southern California Edison Co., supra,* 112 Cal.App.4th at p. 1121.) An appellate court will not interfere except when the decision shocks the conscience and suggests passion, prejudice or corruption by the jury, or where the evidence demonstrates the award is insufficient as a matter of law. (*Westphal,* at p. 1078.) Here, the judgment on the cross-complaint is supported by substantial evidence and does not shock the conscience or suggest passion or prejudice.

The jury awarded nominal damages to Gramatovich and Heller, and $70,650 to Rupp representing an uncontested share of 2003 interest income that was not paid to Rupp due to an oversight.[2] Obviously, this damage award is inconsistent with a jury finding that money was due to GH&R under the profit-sharing agreements. As we will discuss later, the only reasonable explanation for the jury's verdict is that the jury found liability on the defamation claim, but rejected other claims in the cross-complaint.

Appellants rely on the rule that a general verdict in their favor, such as the verdict in this case, is deemed to include the findings necessary to support the claims alleged in the pleading. "A general verdict is that by which they pronounce generally upon all or any of the issues, either in favor of the plaintiff or defendant; a special verdict is that by which the jury find the facts only, leaving the judgment to the Court." (Code Civ. Proc., § 624.) Accordingly, a general verdict generally implies the specific findings essential to the party's claim. (*Henderson v. Harnischfeger Corp.* (1974) 12 Cal.3d 663,

[2] Cross-defendants argue that the amount awarded to Rupp was a miscalculation, but do not contend that the amount should be adjusted.

673; see also *Willdan v. Sialic Contractors Corp.* (2007) 158 Cal.App.4th 47, 57.) Stated differently, when a general verdict requires findings to support a theory of liability, the findings are deemed to have been made and the judgment will be upheld if those findings are supported by substantial evidence. (*Henderson* at p. 673; see also *Price v. Bekins Van & Storage Co*. (1918) 179 Cal. 326, 328.)

Appellants contend that this rule should be applied to the cross-complaint and that every factual finding necessary to all claims presented to the jury must be implied. We do not agree. The rule relied on by appellants can be applied when there is a single theory of liability or claims on multiple theories based on essentially the same factual elements. In such cases, the verdict may be treated as implying the factual findings are necessary to support liability.

The situation is different, however, when the causes of action are separate and factually independent. (*Henderson v. Harnischfeger Corp., supra,* 12 Cal.3d at p. 674.) The cross-complaint in this case alleges separate and independent causes of action based on different factual elements. As relevant to the issue on appeal, the factual elements of claims concerning the profit-sharing agreements are entirely different from the factual elements of the defamation cause of action. Where several separate factual claims are tried, a general verdict will not be disturbed if a single claim is supported by substantial evidence and unaffected by error, although other claims may be submitted to the jury without any evidentiary support. (*Gillespie v. Rawlings* (1957) 49 Cal.2d 359, 369; see 7 Witkin, Cal. Procedure (5th ed. 2008) Trial, § 354, pp. 413-414.) In such cases, it will be assumed that the jury found liability on the claim which is supported by substantial evidence. (*Gillespie*, at pp. 368-369; *Jones* v. *Evans* (1970) 4 Cal.App.3d 115, 119.)

As Core argues, the verdict and nominal damage award necessarily compel the conclusion that the jury found liability solely on the defamation claim. It is conceded that the defamation claim was supported by essentially undisputed evidence that Klein made defamatory statements that Gramatovich and Heller were unethical and incompetent. And, in its jury instruction concerning defamation, the trial court expressly

stated that, without evidence of damage to their reputations, Gramatovich and Heller "are entitled to a nominal sum, such as one dollar or such greater sums as you believe is proper . . . ." Because appellants presented no evidence of any damage to the reputations of Gramatovich or Heller, it is clear that the one dollar damage awards were made in conformity with these instructions.

Nothing in the record supports the conclusion that the jury found other and more financially significant allegations in the cross-complaint to be true, and simply failed to award damages due to a mistake or oversight or passion, prejudice or corruption. The finding of liability on the defamation claim coupled with a rejection of liability on other claims does not indicate any jury confusion or misconduct. There is nothing in the record to suggest that the jury made factual findings that were inconsistent with its damage award or simply overlooked the question of damages entirely. Also, the jury found appellants liable to Core in an amount exceeding $40 million. It is not reasonable to conclude that the jury would have also found Core liable to appellants on claims based on the same business relationship. It would be unreasonable to treat the finding of liability on the defamation claim as a finding of liability on the other claims simply because the jury returned a general verdict. (See *Henderson v. Harnischfeger Corp.*, *supra*, 12 Cal.3d at p. 674; see *Willdan v. Sialic Contractors Corp.*, *supra*, 158 Cal.App.4th at p. 57.) We will not convert a pyrrhic victory into a monetary windfall.

Furthermore, although the profit-sharing issues were vigorously contested, there is no persuasive evidence to support the claim by appellants that Core breached their profit-sharing agreements by failing to pay GH&R a share in the profit to Core from its acquisition of 23,400 Prado Class D bonds in 2003. Core received no revenue from the bonds in 2003 beyond a $125,000 payment from Old Growth and there is no credible evidence of the value of the bonds, if any, at the time of issuance or thereafter. The bonds were a speculative investment that provided only a potential for substantial revenue when the bonds matured in 2014. More risk existed because the bonds were subject to a forfeiture agreement in the event Core or Atlantic ceased to be the managers

of Prado which, in fact, occurred. And, any rights of GH&R under the profit-sharing agreements terminated when they resigned from the employ of Core in May 2004.

In addition, there is no evidence that Core and Klein transferred the bonds to Old Growth in order to avoid paying GH&R under their profit-sharing agreements. The transfer to Old Growth was intended to avoid an immediate tax liability, and neither the acquisition of the bonds, nor their transfer to Old Growth was challenged by GH&R.

GH&R argue that the transaction with the Cancer Center of Santa Barbara shows that the bonds had value and should have been treated as revenue in 2003. In that transaction, the Cancer Center deposited $10 million into Core's Old Growth account in return for 1000 of the bonds and a personal guaranty by Klein. The transaction, however, would have provided revenue to Core only if Core avoided the forfeiture problem and exercised its option to repurchase the bonds. Also, there was no evidence of the value of the Cancer Center transaction bonds separate from Klein's guaranty.

No Instructional Error Regarding Parol Evidence Rule

Appellants contend that the jury's failure to award substantial damages on the cross-complaint resulted from instructional error concerning the parol evidence rule. The trial court instructed the jury it could not consider prior oral promises by Core or Klein that contradicted the GH&R employment agreements "as a defense to plaintiff's claim for breach of contract." Appellants argue that the instruction was error because the parol evidence rule permits consideration of extrinsic evidence when a written agreement is not integrated or only partially integrated, and when the parol evidence is offered to "establish illegality or fraud." (Code Civ. Proc., § 1856, subd. (g).) Appellants claim the instruction likely caused the jury to disregard oral promises in determining GH&R's claim for compensation under the profit-sharing plan. We disagree.

The parol evidence rule generally prohibits the introduction of extrinsic evidence to alter or add to the terms of an integrated written instrument. (Code Civ. Proc., § 1856; Civ. Code, § 1625; *Casa Herrera, Inc. v. Beydoun* (2004) 32 Cal.4th 336, 343.) Integration may be complete, intending to be a final expression of all terms of the agreement, or partial, intending to be a final expression of certain terms of the agreement.

(*Hayter Trucking, Inc. v. Shell Western E&P, Inc.* (1993) 18 Cal.App.4th 1, 13-14.) In determining integration, a court considers the completeness of the written agreement, the circumstances when it was made, the existence of an integration clause, whether the prior agreement might naturally be made as a separate agreement, and whether the jury might be misled by the parol testimony. (*Marani v. Jackson* (1986) 183 Cal.App.3d 695, 702.)

Here, the employment agreements are at least partially integrated. They include an integration clause, an agreement concerning profit-sharing might naturally be made as a separate agreement, and compensation was not covered in the employment agreements at all.

The weakness in appellants' argument, however, is not the level of integration of the agreements, but the fact that appellants are challenging a jury instruction that does not apply to the substance of their claim. Appellants rely on an instruction regarding the jury's determination of Core's breach of contract claim in the complaint. The trial court instructed the jury that the employment agreements are integrated "as to the matters set forth in the agreements intended by the parties to define their business relationship," and that the jury may not consider the alleged oral promises regarding profit sharing "as a defense to plaintiff's claim for breach of contract."

It is undisputed that profit sharing and other compensation matters were not set forth in the written employment agreements. It is also clear that Core's breach of contract claim focused on appellants' misappropriation of trade secrets and other proprietary information, and conduct by GH&R prior to their resignations. Appellants do not claim the parol evidence jury instruction resulted in prejudice to appellants in the jury's verdict on the Core complaint or any matter other than compensation due to GH&R under the profit-sharing arrangement.

Appellants simply maintain that the parol evidence instruction pertaining to Core's complaint applies to their profit-sharing claim alleged in the cross-complaint. They argue, in effect, that an instruction not to consider prior understandings regarding matters set forth in the employment agreements also constituted an instruction that the

jury could not consider understandings in determining the merits of appellants' claim for a share of Core's profits set forth in other documents.

Nothing in the record or the instruction itself supports the assertion that it is likely that an instruction concerning parol evidence regarding the written employment agreements would prevent the jury from considering the same evidence in determining a profit-sharing arrangement that is not mentioned in those agreements. The instruction says the profit-sharing evidence could not be considered as a defense to Core's contract claim. It does not say to the jury that it could not be considered with respect to the profit-sharing arrangement alleged in the cross-complaint and, in fact, the evidence proffered by appellants regarding the profit-sharing plan was admitted into evidence.

ATTORNEY FEES

The cross-complaint sought to rescind the Bridge Note on the ground of fraud. Determining that Core was the prevailing party, the trial court awarded $250,000 in attorney fees to Core pursuant to an attorney fee provision in the Bridge Note. Appellants contend that, even if the judgment is affirmed, they prevailed on the cross-complaint and attorney fees should not have been awarded to Core. We disagree.

"In any action on a contract, where the contract specifically provides [for] attorney's fees and costs . . . the party who is determined to be the party prevailing on the contract . . . shall be entitled to reasonable attorney's fees in addition to other costs." (Civ. Code, § 1717, subd. (a).) "The court . . . shall determine who is the party prevailing on the contract for purposes of this section . . . . Except as provided in paragraph (2), the party prevailing on the contract shall be the party who recovered a greater relief in the action on the contract." (Civ. Code, § 1717, subd. (b)(1).)

When one party obtains a clear victory, that party is entitled to attorney fees as a matter of right. (*Hsu v. Abbara* (1995) 9 Cal.4th 863, 875-876.) Conversely, the trial court has broad discretion to determine the prevailing party when the results of the litigation are mixed. (*Ibid.*) In exercising its discretion, the trial court considers the relative success of the parties by comparing the relief obtained with the litigation objectives shown by the record. (*Id.* at p. 876.) The court should consider substance over

form and, "guided by 'equitable considerations,'" select the party who has achieved its main litigation objective as the prevailing party. (*Id.* at p. 877.)

On appeal, we review a determination of the legal basis for an award of attorney fees de novo as a question of law. (*Sessions Payroll Management, Inc. v. Noble Const. Co., Inc.* (2000) 84 Cal.App.4th 671, 677.) But, we defer to the trial court's discretion with respect to disputed facts. (*Silver v. Boatwright Home Inspection, Inc.* (2002) 97 Cal.App.4th 443, 446, 448-449.)

This is clearly not a case where appellants obtained a clear victory on their cross-complaint which would necessarily entitle them to attorney fees. To the contrary, Core achieved its main litigation objective by avoiding any material liability. Appellants sought in excess of $20 million in damages and received only nominal damages. The trial court did not abuse its discretion in implicitly concluding that Core prevailed on the contract for purposes of Civil Code section 1717. (See *Scott Co. of California v. Blount, Inc.* (1999) 20 Cal.4th 1103, 1109.)

The judgment is affirmed. Costs to respondents.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P.J.

COFFEE, J.

James W. Brown, Judge

Superior Court County of Santa Barbara

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